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No. 94-311

IN THE
SUPREME COURT OF THE UNITED STATES

October Term - 1994

FOSTER WHEELER CORPORATION, Petitioner,

v.

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF ON BEHALF OF FOSTER WHEELER CORPORATION

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INTRODUCTION

This brief is submitted in response to respondent's brief in opposition to the petitions of FWC and FWEC for certiorari.[1]

POINT I

CERTIORARI SHOULD BE GRANTED IN THIS CASE TO RESOLVE A CONFLICT IN THE CIRCUITS CONCERNING THE RETROACTIVITY OF AN AGENCY DECISION (NLRB) ENFORCED BY THE CIRCUIT COURT OF APPEALS

After nine years of litigation, it appears that rhetoric has replaced reality in the contentions made by LIUNA as to why this Court should not grant certiorari in this case. Thus, LIUNA focuses upon the alleged "subterfuge" and "deceit" of FWEC in its approach to securing the MOEPSI contract. (Opp. 2, 5, 8) Rather, as discussed more fully in the petition of FWEC, MOEPSI's award of the contract to EPC[2] was widely publicized during the fall and winter of 1984. (App. 11a) In fact, LIUNA filed a grievance concerning the award on April 9, 1985. (App. 13a)

LIUNA's liberal sprinkling of the words "subterfuge" and "deceit" throughout its brief is obviously intended to obfuscate the significant legal issues presented by the petitions of FWC and FWEC. Interestingly, LIUNA makes no mention of the fact that unfair labor practice charges were filed by LIUNA in three separate regions of the National

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[1]The parties to this proceeding shall be identified as follows: Foster Wheeler Corporation (FWC); Foster Wheeler Energy Corporation (FWEC); Laborers International Union of North America (LIUNA).

[2]Energy Plant Constructors.

Labor Relations Board. Each charge was dismissed on the ground that LIUNA had not achieved majority status at the worksite, as was necessary to convert the section 8(f) prehire agreement into a section 9(a) collective bargaining agreement. (App. 15a) Each of the Regional Directors was obviously unimpressed by LIUNA's claims that the law as it then existed should somehow bend to LIUNA's allegations of "deceit" and "subterfuge". In fact, LIUNA's allegations of deceit and subterfuge are completely irrelevant. Under the law as it previously existed, courts never examined the good faith of the parties in their contractual relationship, but sought to determine simply whether repudiation was effectively communicated by act or deed. As indicated above, the court below has found that the award of the MOEPSI contract to EPC was widely publicized during the fall and winter of 1984. By this and other acts, including several written communications, there can be no question that FWEC fulfilled every legal requirement for repudiation under the law as it existed prior to *Deklewa*.[3] Now LIUNA contends that certiorari should not be granted because of these "unique facts" and because the issue presented as to the retroactivity of *Deklewa* will probably never recur. (Opp. 10) In support of that contention it cites this Court's opinion

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[3]Under pre-*Deklewa* law, a prehire agreement could be repudiated at least four different ways. First, by conduct which is open and notorious. *Contractors, Laborers, Teamsters and Engineers Health and Welfare Plan v. Harkins Construction and Equipment Company, Inc.*, 733 F.2d 1321, 1325 (8th Cir. 1984). Secondly, repudiation may be communicated orally. *Ironworkers 103 v. Higdon Construction Company, Inc.*, supra. Thirdly, repudiation may be effectively communicated in writing. *Mesa Verde Construction Company v. Northern California District Council of Laborers*, 598 F.Supp. 1092 (N.D.Cal. 1984). Finally, the employer may repudiate a contract by a petition for an election. *Albuquerque Installation Contractor, Inc.*, 256 NLRB 61 (1981). The record is replete with incidents which would satisfy the foregoing requirements.

in *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955). While it is true that in *Sioux City* a divided Supreme Court dismissed a writ of certiorari which it had previously granted on the ground that the issue presented was of isolated significance, the Court went on to state:

> "...it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, **and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal**. *Lane & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)." (Emphasis added.)

This case clearly falls within those in which there is a "real and embarrassing" conflict of opinion and authority between the circuit courts of appeal. Further, inextricably intertwined with that issue is the broader question of the standard to be applied in the review of judicial decisions based upon new rules announced in agency determinations. We shall discuss that issue in the next point of this reply brief.

In our petition we pointed out that the Third Circuit stands alone as **the only circuit** which has applied *Deklewa* retroactively to achieve a result which would not have been possible under pre-*Deklewa* law as reflected in *R. J. Smith Construction Company, Inc.*, 191 NLRB 693 (1971) and its progeny. (Pet. p. 13) In contrast, the Fifth, First and Ninth Circuits have refused to apply *Deklewa* retroactively where the union had not achieved majority status prior to repudiation. *CEK Industrial Mechanical Contractors, Inc., et al. v. NLRB*, 921 F.2d 350 (1st Cir. 1990); *United Bhd.*

of Carpenters v. Mar-len of Louisiana, 906 F.2d 200 (5th Cir. 1990); *Mesa Verde Construction v. Northern California District Council Laborers*, 895 F.2d 516 (9th Cir. 1989).[4] Indeed, we pointed out that in *International Association of Bridge, Structural & Ornamental Ironworkers v. NLRB*, 843 F.2d 770 (3d Cir. 1988), in which the Third Circuit applied *Deklewa* retroactively, it pointed out that even under the old *R. J. Smith* rule it appeared entirely likely that the Board would have held that Deklewa was not free to repudiate its agreement with the union. (843 F.2d at 781) LIUNA contends, however, that each of these cases was decided on its own facts, suggesting that the lack of the union's majority status did not play a dominant role in the court's decision. Such is clearly not the case. (Opp. 12) For example, in *CEK Industrial Mechanical Contractors*, supra, at 358, the court said:

> "In those cases in which the rule was applied retroactively, there was evidence that the union had nearly or actually achieved majority status through the conversion doctrine. See *Bufco Corp.*, 899 F.2d at 612; *W. L. Miller*, 871 F.2d at 749; *Ironworkers (Deklewa)*, 843 F.2d at 781. These courts reasoned that there would be no manifest injustice in applying

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[4]Five district courts (in addition to the district court in this case) have reached the same conclusion. *Construction Industry Welfare Fund of Rockford, Illinois v. Jones*, 672 F.Supp. 291 (N.D. Ill. 1987); *Trustees of Michigan Laborers Health Care Fund v. M. M. VanderVeen Construction Company*, 736 F.Supp. 138 (W.D.Mich. 1989), *Trustees of National Automatic Sprinkler Industry Pension Fund v. American Automatic Fire Protection*, 680 F.Supp. 731 (D.Md. 1988); *Northern California District Council of Laborers v. Strauss Construction Co.*, 672 F.Supp. 430 (N.D.Cal. 1987), affirmed 897 F.2d 533 (9th Cir. 1990); *Sheet Metal Workers Local 312 v. Action Enterprises*, 136 LRRM 2743 (1987).

Deklewa because even under the old rule the employer had acted its own risk in repudiating the agreement."

LIUNA further contends that even under pre-*Deklewa* law Foster Wheeler's repudiation of the agreement would have been ineffective under the so-called "doctrine of prevention". (Opp. 11, n. 9) The theory espoused by LIUNA is that had FWEC applied its agreement to the MOEPSI project, the union would have supplied laborers from its Local 70 hiring hall and thus would have achieved majority status. The Third Circuit declined to pass upon this contention, but noted that it is "...far from clear that equitable principles apply to the 'manifest injustice' choice of law inquiry." (App. 43a) In more basic terms, is it not somewhat audacious of LIUNA to make this argument in light of the finding by the district court (undisturbed by the Third Circuit), that at the time of the MOEPSI project and throughout the litigation of this case LIUNA was operating a local hiring hall through its appointed trustee, which illegally discriminated against non-union members in violation of both federal and state law? (App. 66a) See Labor Management Relations Act, §158(a)(3), (b)(2); Alabama Code Section 25-7-30.

This case, therefore, is of importance, first, because it involves a distinct split among the circuits and, secondly, because the success of LIUNA in arbitration would compel the employer to pay very significant monetary damages to LIUNA for not utilizing a hiring hall found to be in violation of both federal and state law. Presumably, the union would then be free to distribute the proceeds of those damages in the same discriminatory manner in which it operated its hiring hall. Certainly, the Court should not countenance such a result, and relief through the process of certiorari should be granted.

POINT II

CERTIORARI SHOULD BE GRANTED TO DETERMINE THE PROPER STANDARD FOR REVIEW OF NEW RULES ANNOUNCED IN ADMINISTRATIVE ADJUDICATIONS WHEN THE ISSUE ARISES IN A PURELY JUDICIAL SETTING

The confusion which surrounds the standard to be applied in determining the retroactivity of administrative adjudications, when the issue arises in a judicial setting, is best exemplified by the position of the parties in this case and the diversity of the circuit courts of appeal which have considered the retroactivity of *Deklewa*. In this case LIUNA, while accepting the rationale of the Third Circuit in this case, clings tenaciously to the position that this Court's decisions in *James B. Beam Distilling Company v. Georgia*, 501 U.S. 529 (1991) and *Harper v. Virginia Department of Taxation*, 113 S.Ct. 2510 (1993), dictate the retroactive application of the Third Circuit's decision in *Ironworkers Local No. 3*, supra, not the Board's decision in *Deklewa*.

(Opp. 16) Petitioners agree with the district court, which held that since this case involves a judicial adjudication, retroactivity is governed by the standards set forth in *Chevron v. Huson*, 404 U.S. 97 (1971), rather than *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). (App. 259a) The Third Circuit reversed the district court, finding that it erred when it departed from *Chenery*'s "manifest injustice" analysis which it deemed appropriate for "agency adjudications" and instead applied the *Chevron* analysis. (App. 3a, 34a) However, the court below went on to apply a five-factor test announced in *Retail, Wholesale & Department Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972), despite the fact that the D. C. Circuit has acknowledged that it has applied a variety of tests to determine the retroactive

application of administrative decisions. *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C.Cir. 1993); *United Food Workers International Union v. NLRB*, 1 F.3d 24 (D.C.Cir. 1993).

In *Ironworkers Local 3*, 843 F.2d at 780, the Third Circuit applied *NLRB v. Semco Printing Center, Inc.*, 721 F.2d 886 (2d Cir. 1983), in which the Second Circuit said that deference should be given to NLRB decisions absent some manifest injustice. In applying that standard the Third Circuit commented that its result would be no different if it engaged in an independent analysis under *Chenery* or *Chevron*. (843 F.2d at 780, n. 12.) However, in this case the Third Circuit states that its reference to *Semco* was dicta, suggesting by implication (but without any justification whatsoever) that what the Third Circuit really applied in *Ironworkers Local 3* was *Chenery*. (App. 42a) Finally, the court below acknowledged in its decision that not every court applies the same standard of review in cases such as this. (App. 39a) In that, the Third Circuit is clearly correct. In deciding whether *Deklewa* should be applied retroactively, the Fifth, Seventh and Ninth Circuits have applied the *Chevron* test, as did the district court below. *NLRB v. Bufco Corp.*, 899 F.2d 608, 609, 611-12 (7th Cir. 1990); *United Bhd. of Carpenters Local Union 953 v. Mar-len of La., Inc.*, 906 F.2d 200 (5th Cir. 1990); *Mesa Verde Construction Co. v. Northern California District Council of Laborers*, 895 F.2d 516, 519 (9th Cir. 1989), cert. denied 498 U.S. 877 (1990). Other circuits have applied the "manifest injustice" test. See *CEK Industrial Mechanical Contractors, Inc. v. NLRB*, 921 F.2d 350, 357-58 (1st Cir. 1990); *NLRB v. Viola Indus. Elevator Div., Inc.*, 979 F.2d 1384, 1396-97 (10th Cir. 1992). (See other cases cited by FWC in its petition for certiorari, pages 13-14.) Clearly, therefore, this issue cries out for clarification and direction by this Court.

The distinction between *Chevron* and *Chenery* is of vital significance, as pointed out by the Third Circuit:

> "The key discrepancy between the two inquiries is that, whereas *Chevron Oil* focuses on the ***reasonable expectations*** of the ***class of persons*** who will be adversely affected by retrospective application of the newly announced rule of law, *Chenery* concentrates on the ***actual*** reliance on the prior rule by the ***particular*** adversely affected ***party*** before the court. That means that the *Chevron Oil* analysis needs only be done once, in the decision first recognizing the new rule; by contrast, the *Chenery* analysis must be repeated in each case where the rule may be retrospectively applied." (App. 35a)

Petitioner's contention that this case is inappropriate for consideration of the retroactivity of agency decisions because it did not arise from an agency determination, but rather, from a decision of the federal judiciary under Section 301 of the Labor-Management Relations Act, 29 U.S.C. §185, supports the position of FWC and places LIUNA in lockstep with petitioners and the district court, which expressed exactly that reasoning in applying a *Chevron* analysis. (App. 259a) In any event, it is obvious from the foregoing that a state of confusion reigns in this very critical area of the law. Furthermore, at issue is a question which certainly will reoccur, not only with regard to adjudications of the National Labor Relations Board, but with regard to myriad other agencies of the federal government. Accordingly, we urge the court to grant certiorari as to this vital and timely issue.

POINT III

CERTIORARI SHOULD BE GRANTED AS TO THE CIRCUIT COURT'S REFERRAL OF THE ISSUES OF BREACH AND DAMAGES TO ARBITRATION

The petitions of FWC and FWEC contend that the Third Circuit erred in referring the issues of breach and damages to arbitration, in view of the undisturbed finding of the district court that LIUNA, through its Local 70 and designated trustee, operated a hiring hall which discriminated against non-members in violation of both state and federal law. Respondent's brief in opposition devotes only one paragraph to this important issue, stating simply that Judge Becker's "straightforward treatment of this diversionary issue is more than satisfactory and raises no issue worthy of certiorari". (Opp. 17) It also comments that no complaint or NLRB charge had ever been filed with regard to the illegal hiring hall maintained by Local 70. Isn't it interesting that LIUNA chooses to ignore the decisions of the three Regional Directors which dismissed LIUNA's charges attacking the repudiation of FWEC's contract with LIUNA, but now points to the absence of a complaint or NLRB charge as defeating petitioner's request for relief. The simple answer is that no complaint or NLRB charge was filed because the illegality of the hiring hall was not discovered until the trial of this case before the district court, long after the project had been completed. Furthermore, LIUNA makes no mention of the fact that the agreement between LIUNA and FWC specifically provided that FWEC would be obligated to use the local hiring hall only if it were operated lawfully. (App. 304a)

As contended in our original petition, the issues of breach and damages are clearly moot and should not have

been referred to arbitration. Therefore, this Court should grant certiorari as to this issue to preserve longstanding principles of labor law relating to the operation of hiring halls and to prevent LIUNA and its members from unjustly profiting from their own misconduct.

CONCLUSION

Based upon the foregoing and the record as a whole, the Court is urged to grant FWC's petition for a writ of certiorari as to all issues presented.

Respectfully submitted,

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